Supreme Court, U.S.
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No. 93-397

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,

Petitioners,

v.

JANNETTE M. LOHMAN, Director of Revenue, and DELONG'S, INC., THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, and THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When a state imposes a statewide use tax upon *inter*state sales at a rate which, in more than 50% of the state's taxing jurisdictions, is higher than the sales tax rate on identical *intra*state sales, is the resulting discrimination against interstate commerce constitutionally irrelevant merely because in the aggregate the state collects more sales taxes than use taxes?

2. Does *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), validate a state tax scheme which in numerous instances burdens interstate commerce more heavily than intrastate commerce? If so, is *General American* inconsistent with *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Maryland v. Louisiana*, 451 U.S. 725 (1981); and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); and should it be expressly overruled?

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On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with more than 100,000 members and supporters nationwide. WLF regularly appears before federal

and state courts in a variety of areas, and devotes a substantial portion of its resources to the promotion of economic liberty, free enterprise principles, and a limited and accountable government.

WLF strongly believes that the economic well-being of this country depends on the unrestricted flow of commerce, both interstate and across our nation's borders. WLF is concerned that a discriminatory taxing scheme such as Missouri's additional use tax will encourage other states and local taxing jurisdictions to adopt similar taxing measures which discriminate against and restrict the flow of interstate commerce.

Amicus submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of brevity, *amicus* hereby adopts by reference the Statement of the Case set forth in Petitioners' Brief.

To summarize, Missouri imposes a statewide sales tax upon all sellers for the privilege of selling tangible property or rendering taxable service at retail within Missouri. Mo. Rev. Stat. § 144.020 (1992). Missouri also imposes a statewide use tax on any article of tangible personal property stored, used, or consumed within the state. Mo. Rev. Stat. § 144.610 (1992). Practically, the sales tax burden is imposed upon purchases made within Missouri, and the use tax burden upon purchases made outside Missouri.[1/] The basic sales tax and use tax rates (including the additional levies authorized under the

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[1/] Under Mo. Rev. Stat. § 144.615(2) (1992), all properties purchased in transactions that are subject to the Missouri sales tax are exempted from the use tax; thus the use tax applies only to the properties purchased outside Missouri and subsequently brought into the state for storage, use, or consumption.

Missouri Constitution) are both 4.225 percent. Mo. Const. §§ 43(a), 47(a) (1945, as amended); Mo. Rev. Stat. §§ 144.020, 144.610.

In addition, Mo. Rev. Stat. § 144.748 (1992) imposes a statewide additional use tax of 1.5 percent upon all transactions which are subject to the basic use tax. Thus, the total statewide use tax rate in Missouri is higher than the statewide sales tax rate by 1.5 percent.

Missouri has attempted to justify this blatant discrimination on the ground that local governments have the authority to levy optional local sales taxes and, in some of the taxing jurisdictions in Missouri, the local sales tax rates are equal to or higher than 1.5 percent, resulting in the aggregate sales tax rates equal to or higher than the use tax rate. The state has advanced this rationale despite the fact that, in a substantial number of taxing jurisdictions in Missouri, the local sales tax rates are lower than 1.5 percent, resulting in aggregate sales tax rates lower than the use tax rate.

The central issue in this case is whether the additional use tax, which imposes a heavier statewide tax burden upon purchases in interstate commerce than those in intrastate commerce, is justified simply because local jurisdictions may impose optional local sales taxes, where the statute provides no guarantee that the total use tax rate will be equal to or lower than the aggregate sales tax rates in all instances, and in fact the total use tax rate is higher than the aggregate sales tax rates in a number of taxing jurisdictions in Missouri.

SUMMARY OF ARGUMENT

The Missouri additional use tax impermissibly discriminates against interstate commerce on its face, in violation of the Commerce Clause of the United States Constitution. The discrimination cannot be ignored either because its impact is experienced only in some, but not all, taxing jurisdictions and transactions, or on the ground that the "extent" of discrimination is insignificant. Unlike the "fair apportionment" prong or "substantial nexus" prong, two of the other prongs in the four-part test for constitutionality under the Commerce Clause, articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the discrimination prong does not require examination of "extent." This Court has viewed the issue of discrimination as a matter of dichotomy: Any state tax statute that fails to accord to each and every instance of interstate commerce treatment equal to intrastate commerce has been struck down by this Court under the Commerce Clause. In the present case, the Court could best deal with the issue of discrimination by explicitly embracing the bright line test of absolute equality, the standard that has been applied in these precedents.

The bright line test of absolute equality is not only conceptually sound, as it best reflects the nature of the discrimination prong of the *Complete Auto Transit* test, but also is advisable from a practical standpoint. Contrary to Respondent's and the Missouri Supreme Court's suggestion, statistical data cannot accurately quantify the extent or effect of discrimination in this case or in any other case, and cannot provide a meaningful and reliable test for constitutionality. For example, if the Court allows any *de minimis* exception to the Commerce Clause, the Court would then have to define the *de minimis* level, which decision would inevitably be arbitrary. These conceptual and practical problems can be avoided only by the bright line test of absolute equality (*i.e.*, a state tax statute must accord to each and every instance of interstate commerce treatment equal to intrastate commerce, and cannot impose more burdensome taxes on interstate commerce than intra-

state commerce however slight the extent of discrimination might be). Furthermore, the bright line test will discourage states and local jurisdictions from inventing creative taxing schemes that discriminate against interstate commerce, and will decrease the incidence of constitutional disputes which would eventually occupy this Court's and other courts' time and resources.

ARGUMENT

I. THE ADDITIONAL USE TAX STATUTE IS DISCRIMINATORY ON ITS FACE, AND CANNOT BE JUSTIFIED AS PART OF A COMPLEMENTARY TAX SCHEME

Standing together, the sales tax and the use tax generally form a complementary taxing scheme. While the use tax, standing alone, would appear to discriminate against interstate commerce, this Court has not reviewed a use tax statute "within its four corners," but in conjunction with the same state's sales tax statute. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479 (1931). This Court has upheld the use tax under the Commerce Clause when the sales tax and the use tax imposed equal burdens on interstate and intrastate commerce. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Use taxes have been justified under the Commerce Clause as "complementary" or "in lieu" taxes to sales taxes.

Generally, a "complementary" or "in lieu" tax must be "complementary" not only in its nature,[2/] but also in the actual amount of tax burdens. In cases holding that two different taxes are part of a "complementary" taxing scheme, this Court has again and again emphasized that the actual burdens under the two taxes are equal. In *Gregg Dyeing Co.*, for example, the Court emphasized the

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[2/] *See, e.g., Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (in order to be "complementary," taxes must apply to "substantially equivalent events").

fact that the amount of taxes imposed under the compensating tax was "precisely the same amount per gallon." *Gregg Dyeing Co.*, 286 U.S. at 480. Also in *Henneford*, the Court emphasized with respect to the Washington use tax statute at issue that "[e]quality is the theme that runs through all the sections of the statute." *Henneford*, 300 U.S. at 583. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963), the Court pronounced that "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." In *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981), the Court again concluded: "We need not know how unequal the tax is before concluding that it unconstitutionally discriminates." The examples are numerous. *See* Petitioners' Brief, at 15-22.

Equality, the theme that runs through all truly "complementary" taxing schemes, is precisely the quality lacking in Missouri's additional use tax statute. The unequal treatment effected by the additional use tax is clear on the face of the statute: The additional use tax statute imposes a higher statewide use tax rate than the statewide sales tax rate. Even if the effect of optional local sales taxes were to be considered, the additional use tax statute provides no guarantee whatsoever that the use tax burden will be no greater than the aggregate sales tax burden in all instances. In fact, in a number of taxing jurisdictions in Missouri, the use tax rate is higher than the aggregate sales tax rates; thus interstate purchases for use or consumption within these taxing jurisdictions are subject to a heavier tax burden than comparable intrastate purchases. Commentators described a similar sales/use tax scheme in Oklahoma as "probably the most blatant attempted discrimination against out-of-state purchasers."[3/]

[3/] J. Hellerstein & W. Hellerstein, State Taxation, ¶ 16.10[3] (1992). This description relates to the Oklahoma sales/use tax scheme which imposed a 2 percent sales tax on sales within the state and a 4 percent use tax on sales outside the state.

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The discrimination in this case is clear on the face of the statute, and neither Respondents nor the Missouri Supreme Court have denied the existence of discrimination. On the contrary, the majority of the Missouri Supreme Court admitted that: "we acknowledge that the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations." *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.2d 182, 191 (Mo. 1993); Petition, Appendix A ("Pet. App.") at A-16. Nevertheless, the Missouri Supreme Court chose to ignore the facial discrimination, and concluded that the additional use tax statute passed scrutiny under a "practical analysis" or "practical effect" test, because the use tax rate in some jurisdictions and transactions are lower than the aggregate sales tax rate. *Associated Industries of Missouri*, 857 S.W.2d at 192; Pet. App. A-18. Thus, the Missouri Supreme Court concluded that there was no discrimination against interstate commerce on a "statewide basis." *Id.*

In essence, the Missouri Supreme Court's holding and Respondents' arguments in this case are based on the following fallacious assumptions, and *amicus* submits that the Missouri additional use tax statute could be found permissible under the Commerce Clause only by accepting these same assumptions. They are:

[3/](...continued)

The Oklahoma Supreme Court struck down the use tax as repugnant to the Commerce Clause, despite the state's contention that the inequality in the sales/use tax scheme was rectified by the existence of optional local sales taxes. *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278, 1285 (Okla. 1978). The state argued that the higher rate of use tax in that case was merely the legislature's attempt to equalize the interstate tax rate with the greater in-state tax burden and that, if any discrimination existed, it was only a minimal or incidental discrepancy because a large portion of in-state sales were subject to a 4 percent sales tax. *Id.* at 1281. The Oklahoma Supreme Court rejected these arguments, and held the use tax invalid "whether the rate of those municipal taxes be 1%, 2% or 3%." *Id.* at 1285.

(a) A sales/use tax scheme that discriminates against interstate commerce may nevertheless be tolerated under a "practical effect" test, if the impact of the discrimination is not present in each and every instance of interstate commerce, or if the "extent" of discrimination is small; and

(b) The "extent" of discrimination can be ascertained through an examination of statistical data and will provide a meaningful and reliable test for determining whether the discrimination is constitutionally significant.

Both of these assumptions are without support in this Court's Commerce Clause jurisprudence, and will lead to a number of conceptual and practical problems. *Amicus* will examine these two assumptions in turn.

A. The Commerce Clause Requires Absolute Equality in the Treatment of Interstate Commerce in Each And Every Instance

The first fallacious assumption has been explicitly articulated by Respondent Lohman as well as by the Missouri Supreme Court, which insisted on examining the discrimination on a "statewide basis." *Associated Industries of Missouri*, 857 S.W.2d at 192; Pet. App. at A-18. Realizing that the additional use tax statute in issue could not pass constitutional scrutiny under this Court's precedents, *e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); and *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), Respondent Lohman has attempted to distinguish the present case on factual grounds:

> The critical factual distinction between the present case and *Halliburton*, *Maryland v. Louisiana*, *Bacchus*, and *Armco* is that in each of these cases the particular aspect of the sales or use tax under examination operated in a discriminatory manner *each and every instance* in which it applied.

Respondent Lohman's Opposition to Petition for Writ of Certiorari ("Opposition"), at 10 (emphasis added). Thus, Respondent has urged the Court to examine the "overall effect" of the Missouri additional use tax statutes, as the majority of the Missouri Supreme Court did. *See* Respondent Lohman's Opposition, at 14.

Contrary to Respondent's assertion, however, it is clear from this Court's precedents that, in order to be found unconstitutional, a statute does not have to discriminate against interstate commerce in each and every instance; rather, in order to be found constitutional, a statute must provide an equal treatment to interstate commerce in each and every instance. As discussed more extensively in Petitioners' Brief, a discriminatory tax burden is not offset, nor does it lose its significance, by nondiscriminatory treatment of other instances of interstate commerce, and this Court has struck down state tax statutes despite the allegedly small scale of their discriminatory impact. *See* Petitioners' Brief, at 15-25; *see also Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).[4/]

[4/] In *Boston Stock Exchange*, the New York transfer tax on securities transactions allowed: (i) a 50 percent reduction in the tax rate when the sale was made within New York by a nonresident; and (ii) a $350 limit on the total tax liability for a single sale when the sale was made within New York, by a resident or nonresident. Sales made outside New York were subject to the regular rate of tax, computed by the number of shares involved. *Boston Stock Exchange*, 429 U.S. at 323-325.

Clearly the discrimination did not affect *each and every* instance of interstate commerce. For example, in the case of a resident, the discrimination did not affect transactions involving small numbers of shares, because the $350 limit would not be triggered unless the sale involved a large enough number of shares. In the case of a nonresi-

(continued...)

Respondent's "each and every instance" or "*de minimis*" type argument would turn the entire Commerce Clause jurisprudence on its head. This Court has repeatedly rejected similar attempts, and there is no reason why Missouri's discriminatory tax should be treated differently.[5/]

The Missouri Supreme Court's error in this case is based on its fundamental misunderstanding of the concepts of "discrimination" and of the "practical analysis" or "practical effect" test under the Commerce Clause. The Missouri Supreme Court insisted on applying a "practical analysis" or "practical effect" test, rather than a "formalistic and exacting approach," citing *Trinova Corp. v. Michigan Dept. of Treas.*, 498 U.S. 358 (1991), and *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). *Associated Industries of Missouri*, 857 S.W.2d at 191-192; Pet. App. A-17-18. While a brief examination of *Trinova* and *Quill* will show that these cases were cited completely out of context, a more careful analysis will help to explain how the Missouri Supreme Court fundamentally misunderstood the meaning of "discrimination" under the Commerce Clause, as well as how the concept should be interpreted in this case.

[4/](...continued)
dent, the New York Court of Appeals observed that there was no discrimination against interstate commerce in favor of intrastate commerce, because New York sales by nonresidents also involved interstate commerce. *Id.* at 333. This Court flatly rejected that contention, noting: "Although it did not so state, the Court of Appeals apparently believed that such discrimination was permissible under the Commerce Clause. We disagree with the Court of Appeals with respect to both residents and nonresidents." *Id.*

[5/] *Amicus* does not believe that the discriminatory impact of the additional use tax is *de minimis*. However, even if the impact of the statute were *de minimis*, such a fact should be irrelevant as a matter of law.

Trinova involved Michigan's single business tax, which was imposed on a taxpayer's total value added that was apportioned to Michigan based on a formula provided in the statute. The taxpayer in that case challenged Michigan's formulary apportionment under the Due Process Clause and the Commerce Clause. *Quill* involved North Dakota's attempt to compel out-of-state mail-order houses to collect and pay a use tax on goods purchased for use in the state, when such mail-order houses had neither outlets nor sales representatives in North Dakota.

Trinova and *Quill* did not primarily involve the issue of discrimination. Rather, in *Trinova*, the primary issue was whether Michigan's formulary apportionment resulted in "fair apportionment," as required in the four-prong test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).[6/] Thus, *Trinova* involved the fair apportionment issue, a different prong of the *Complete Auto Transit* test.[7/] The principal Commerce Clause issue in *Quill* was the concept of "substantial nexus," which is another prong in the *Complete Auto Transit* test. Unlike the present case, neither case involved the discrimination prong of the *Complete Auto Transit* test.

Trinova and *Quill* illustrate the kind of constitutional scrutiny this Court applies when considering the fair apportionment prong and the substantial nexus prong of the *Complete Auto Transit* test, respectively. In *Trinova*, this

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[6/] The four prongs in the *Complete Auto Transit* test are: (i) substantial nexus between the taxing state and the taxed activity, (ii) fair apportionment, (iii) no discrimination against interstate commerce, and (iv) fair relationship between the tax and the services provided by the state. *Id.*

[7/] While the taxpayer in *Trinova* also alleged that the apportionment formula discriminated against interstate commerce, *Trinova*, 498 U.S. at 384, that claim obviously depended on the fair apportionment issue. Because the Court found the apportionment formula valid and the taxpayer could not point to any facial discrimination in the statute, this claim was rejected. *Id.* at 384-386. In contrast, the Missouri additional use tax statute in this case is facially discriminatory.

Court observed that the nature of the fair apportionment prong test is informed by the original rationale for apportionment of income. Apportionment of income becomes necessary because of the difficulty of identifying the geographic source of the income earned by a multistate enterprise with any precision. Therefore, the Court noted that allocating income among various taxing jurisdictions "bears some resemblance . . . to slicing a shadow." *Trinova Corp.*, 498 U.S. at 373-374 (citing *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-121 (1920); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 192 (1983)).

Because it is the lack of precision and certainty that necessitates formulary apportionment in the first place, formulary apportionment is inherently arbitrary; there is no "precise" or "right" answer. In principle, all apportionment formulas are to some degree arbitrary; in practice, some apportionment formulas are more arbitrary than others. Fairness of apportionment is not a matter of black and white, but many different shades of gray. In the fair apportionment prong, no bright line test of constitutionality can be established or applied. Therefore, the Court strikes down an apportionment formula only when it fails to satisfy absolute minimum tests of rationality.[8] The apportionment formula in *Trinova* passed muster under

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[8] In the fair apportionment prong cases, the Court applies the "internal consistency" and "external consistency" tests to ensure that the apportionment meets a minimum level of rationality. The internal consistency test is satisfied if the formula, if applied by every jurisdiction, would result in no more than all of the unitary business's income being taxed. The external consistency test is satisfied if the factors used in the apportionment formula actually reflect a reasonable sense of how income is generated. *Trinova*, 498 U.S. at 380 (citing *Container Corp.*, 463 U.S. at 169). In order to prevail on the external consistency challenge, a taxpayer must prove by clear and cogent evidence that the income attributed to the state under the formula is in fact "out of all appropriate proportions to the business transacted . . . in that State," or "led to a grossly distorted result." *Trinova Corp.*, 498 U.S. at 380 (citing *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 274 (1978)).

these tests. Furthermore, the formula advanced by the taxpayer was not demonstrably less arbitrary than the state's formula. *Trinova*, 498 U.S. at 377. It was in this context that this Court stated that the Constitution "does not require a formalistic analysis resulting in a penalty for Michigan's selection of an easier calculation method for its taxpayers." *Id.*

The concept of "substantial nexus" at issue in *Quill* is somewhat different. On the one hand, unlike the "fair apportionment" concept, "substantial nexus" presents a real dichotomy at its two extremes: at one extreme, the relationship between the taxing state and the taxed activity is so extensive that the nexus is clearly substantial; at the other extreme, the relationship is nonexistent or so minimal that the nexus is clearly not substantial.[9] On the other hand, in the cases between these two extremes, the substantiality of nexus is a matter of degree, just like the "fair apportionment" concept. Thus, substantiality is a matter of black and white at two extremes of the spectrum, but with many shades of gray in between. In the substantial nexus prong, a bright line test *can* be established and applied, because the issue is a matter of black and white at its extremes; but such a bright line test inevitably carries some artificiality and arbitrariness, because the line is drawn at one point on the spectrum.

In *Quill*, this Court rejected the state's suggestion to abandon the bright line test established in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which held that a state may not impose a duty to collect use taxes on a seller if the seller's only connection with customers in the taxing state is by common carrier or the United States mail. *Quill*, 112 S.

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[9] For example, if the taxpayer is physically present on a permanent basis, has assets and employees, and conducts business within the state, the nexus would be clearly substantial. In contrast, if the taxpayer has no relationship or contact whatsoever with the state (not even through common carrier, telephone, or the United States mail), the nexus clearly would not be substantial.

Ct. at 1914.[10] While the Court rejected the "formalistic" approach in older Commerce Clause cases,[11] the Court noted: "not all formalism is alike. . . [T]he bright line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause." *Id.* Therefore, the Court reasoned:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges. . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning these taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959).

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[10] When the Court first established this rule in *National Bellas Hess*, it was not clear whether the rule was based on the Due Process Clause or the Commerce Clause. In *Quill*, the Court examined the evolution of its Due Process jurisprudence since *National Bellas Hess* and, to the extent that its prior decisions have indicated that the Due Process Clause requires physical presence in a state for the imposition of a duty to collect a use tax, overruled those holdings as superseded by developments in the law of due process. *Quill*, 112 S. Ct. at 1911. However, the Court refused to abandon the bright line rule in *National Bellas Hess* for purposes of the Commerce Clause test. *Id.* at 1914.

[11] *Freeman v. Hewit*, 329 U.S. 249 (1946), and its progeny distinguished, for example, between "direct" and "indirect" taxes on interstate commerce.

Id.[12]

In contrast to the fair apportionment and substantial nexus prongs, the discrimination prong involved in this case presents a pure dichotomy. Discrimination means a lack of equality. For purposes of the Commerce Clause, *either* the statute discriminates *or* it does not discriminate: There is no middle ground. Discrimination in the Commerce Clause is a matter of black and white, without shades of gray in between.

In the discrimination prong, therefore, the only test that reflects the nature of the issue, the only test that is not arbitrary is a bright line test with the line drawn between black and white. If the Court has retained the bright line rule of *National Bellas Hess* because of the inherent benefits of such a rule, despite the risk of "artificiality" in the substantial nexus prong, there is much more reason to apply a bright line rule in the discrimination prong, where the only rule that is not arbitrary is a bright line test. Indeed, failing to recognize a bright line rule of absolute equality would lead to artificiality and arbitrariness.

The bright line test of absolute equality not only is conceptually sound, but also will further the ends of the Commerce Clause. Like the bright line test sustained in *Quill*, it will provide "precise guides to the States in the exercise of their indispensable power of taxation." *Quill*, 112 S. Ct. at 1915. As this Court has noted, providing

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[12] The Missouri Supreme Court clearly cited *Quill* out of context. In discussing the evolution of its Commerce Clause jurisprudence over the years, this Court noted that it renounced the formalistic distinction between "direct" and "indirect" taxation on interstate commerce so that taxes with the same economic effect would not be treated differently under the Constitution simply because of the "magic words or labels" attached to them. It was in this context that this Court cited *Complete Auto Transit* for the importance of looking past the formal language of the tax statute to its practical effect. *Quill Corp.*, 112 S. Ct. at 1912. However, as the Court noted in *Quill*, it is clear that "not all formalism is alike," and the Court ultimately sustained the bright line test of *National Bellas Hess*. *Id.* at 1914.

precise guides to the states is especially important in the sales and use tax area, which is at issue in this case:

> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.

Id. (fn. ref. omitted). A failure to acknowledge this rule, in contrast, would result in more confusion and controversy regarding application of the discrimination prong of the *Complete Auto Transit* test.

This Court has in fact applied a bright line test of absolute equality in its precedents, both before and since the *Complete Auto Transit* decision. By explicitly acknowledging and adopting the bright line test of absolute equality which has been already established by this Court (*i.e.*, a state tax statute must accord to each and every instance of interstate commerce treatment equal to intrastate commerce, and cannot impose more burdensome taxes on interstate commerce than intrastate commerce, however slight the extent of discrimination might be), this Court would put to rest any misguided conceptions regarding the meaning of "discrimination" and any attempts by states and local taxing jurisdictions to evade the Commerce Clause through creative taxing schemes.

B. Statistical Data Cannot Accurately Quantify The Extent of Discrimination, and Cannot Provide a Meaningful and Reliable Test for Constitutionality

The second fallacious assumption underlying the Missouri Supreme Court's analysis is that the extent of discrimination could be ascertained with reasonable accuracy based on statistical data, and could provide a meaningful and reliable guide for determining the constitutionality of the statute. In fact, however, statistical data and information that would inevitably be utilized in determining the extent of discrimination are inherently ambiguous and susceptible to misinterpretation, and would not provide a reliable test for constitutionality.

A good example of the misuse or misinterpretation of statistical data is found in the Missouri Supreme Court majority's reasoning. The record in this case shows that, in the calendar year 1990, 841 out of 1,573 taxing jurisdictions in Missouri (53.5 percent) had local sales tax rates below 1.5 percent, and 26.5 percent of Missouri's total population lived in these 841 taxing jurisdictions. The record further shows that 6.86 percent of the taxable intrastate sales occurred in these 841 jurisdictions, yielding 2.76 percent of the total sales taxes collected in the state. *Associated Industries of Missouri*, 857 S.W.2d at 185, Pet. App. A-5.

From this data, the majority of the Missouri Supreme Court jumped to the conclusion that only 6.86 percent of the taxable intrastate sales would have been subject to a sales tax rate less than the use tax rate. *Id.* at 191; Pet. App. A-16-17. However, as Chief Justice Robertson of the Missouri Supreme Court pointed out in his dissenting opinion, this case is an attack on the *use* tax. *See* Pet. App. A-26. Therefore, it is irrelevant what percentage of *intrastate* sales occurred in those jurisdictions with local sales tax rates below 1.5 percent. *Id.* While the amount and percentage of the total *out-of-state* purchases in those jurisdiction may be a better indicator of the extent of discrimination, the record in this case provides no basis from which to calculate these numbers in 1990. *Id.* Moreover, even if these numbers were available, they would essentially be irrelevant because they relate to the purchases in 1990, before the additional use tax came into effect.[13/]

Furthermore, even if the amount and percentage of interstate purchases after the effective date of the additional use tax statute were available, they would by no

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[13/] The additional use tax became effective as of July 1, 1992.

means reflect the actual impact of discrimination. The *actual impact* of discrimination could be measured not by comparing the amounts of interstate and intrastate purchases, but by the actual economic impact which the discriminatory tax had on the purchasing decisions of consumers (*i.e.*, whether to buy interstate or intrastate). This impact is impossible to measure. Even if the numbers showing the amounts and percentage of interstate and intrastate purchases during the periods before and after the effective date of the additional use tax were to be obtained, such figures would not show the *actual impact* of the discriminatory tax, unless *all factors* affecting purchase decisions (other than the tax burden factor) could be identified *and* neutralized.[14/]

Assuming, *arguendo*, the actual impact of the discriminatory tax could be ascertained, such figure would not answer the very question for which the quantification was attempted in the first place, *i.e.*, whether the extent of discrimination is *de minimis*. In order to answer this question, the Court would have to: (i) decide where the *de minimis* line is to be drawn, and (ii) then apply the *de minimis* line test.

Establishing a test based on a "*de minimis*" level of discrimination would be akin to establishing a bright line test but without the bright in the line since what is *de minimis* is always open to question. Thus, the Court will be forced to draw a line one way or another; when the Court does not adopt the test of absolute equality, however, the line will be unclear, arbitrary, and without support in the Commerce Clause. Arbitrariness may be acceptable where no bright line test is possible (as in the case of the

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[14/] Furthermore, the impact of such other factors would be legally irrelevant. In *Boston Stock Exchange*, for example, this Court rejected the New York Court of Appeals's reasoning that higher transfer taxes on New York residents upon out-of-state sales of securities than in-state sales would have no "practical" effect since "it is more than likely . . . that the sale would be made on a New York exchange in any event." *Boston Stock Exchange*, 429 U.S. at 333.

fair apportionment prong) or where a bright line test inevitably carries arbitrariness and artificiality (as in the case of the substantial nexus prong). In addressing the discrimination prong, however, the bright line test of absolute equality not only is possible but also is devoid of arbitrariness and artificiality; therefore, arbitrariness is not acceptable. *Amicus* submits that only the bright line test of absolute equality would be devoid of arbitrariness and administrative problems, and would best reflect the nature of the discrimination prong of the *Complete Auto Transit* test.

Assuming further that a *de minimis* line could be determined and somehow justified, the application of such a line would raise another problem. Statistical data can and does change over time. Thus, using statistical figures as the measure of constitutionality would result in the anomaly of changing the constitutionality (thus, the enforceability) of a statute each year, or even each quarter or month, as the numbers have changed and will change.[15/]

In sum, any attempt to quantify the "extent" of discrimination resulting from the additional use tax, and indeed any attempt to draw constitutional conclusions from statistical data, would be essentially futile. Such inquiry is bound to reach a wrong answer because it started with a wrong assumption, *i.e.*, that the "extent" of discrimination can be quantified and is relevant under the Commerce Clause.

[15/] The record in this case shows that, as a matter of fact, local sales taxes in some jurisdictions were temporarily imposed and then expired by the passage of time. Joint Appendix, Stipulation Exhibit J. Both the number of taxing jurisdictions imposing local sales taxes and the local sales tax rates are subject to change. Thus, as long as the "extent" of discrimination, as the Missouri Supreme Court understands it, remains a relevant inquiry, this Court and other courts would be forced to shoot at a constantly moving target.

II. THIS COURT'S DECISION IN *GENERAL AMERICAN* DOES NOT JUSTIFY MISSOURI'S DISCRIMINATORY ADDITIONAL USE TAX STATUTE AND, TO THE EXTENT IT CAN BE INTERPRETED AS SUPPORTING THE ADDITIONAL USE TAX STATUTE, IT SHOULD BE OVERRULED

It has been suggested by Respondents and the Missouri Supreme Court that the additional use tax may be justified by this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). As pointed out in Chief Justice Robertson's dissenting opinion in the decision below, *General American* does not govern the outcome of this case because it involved the application of the Equal Protection Clause rather than the Commerce Clause, and involved a property tax rather than a sales/use tax scheme. *See* Pet. App. A-27-30. However, if and to the extent that *General American* is interpreted as suggesting that a discriminatory taxing statute does not violate the Commerce Clause if it discriminates against interstate commerce in some but not all instances or if the "extent" of such discrimination is small, the case should be overruled.

Contrary to the Missouri Supreme Court's suggestion, Pet. App. A-13, *General American* is not *the seminal* case of the "complementary" or "in lieu" tax doctrine. The "complementary" or "in lieu" tax doctrine was recognized as early as the 19th century. *See, e.g., Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1868). It has been more clearly articulated in *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), and *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937). *Henneford* is considered the classic example of the "in lieu" tax doctrine in the sales/use tax area. *See, e.g.*, J. Hellerstein & W. Hellerstein, State Taxation, ¶ 16.10[1]. Other than in *Henneford*, *General American* has been cited by very few Supreme Court decisions,

usually in string citations and always for propositions unrelated to the issue in this case.[16/]

Reviving *General American* in the context of this case would be perceived as an open invitation to the states and local taxing jurisdictions to devise creative taxing schemes in an attempt to evade the Commerce Clause. States could be led to believe that they may generally be able to justify discriminatory taxes simply by exempting some instances of interstate commerce from the discrimination, or by hiding behind local jurisdictions. The potential for such misinterpretation would not be limited to the sales/use tax area, but would breed confusion and uncertainty, and therefore more litigation, in the discrimination prong of the Commerce Clause in general. Thus, reviving *General American* will not only restrict and harm the flow of interstate commerce, but also will divert more time and resources of this Court and other courts, states, and taxpayers into needless constitutional disputes.[17/]

[16/] *General American* has been cited for propositions that a state may apply different modes of tax assessment unless they produce inequality on persons or property of the same class, *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 190 (1945); and that a state may impose taxes upon the instruments of interstate commerce (such as rolling stock) and those who are engaged in interstate commerce under its general tax system, *Nashville, Chattanooga & St. Louis Railway Co v. Wallace*, 288 U.S. 249, 267 (1932); *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 493 (1932); and in the Equal Protection Clause context, *Gregg Dyeing Co.*, 286 U.S. at 482; *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 283 (1932); *Salomon v. State Tax Commission of New York*, 278 U.S. 484, 491-492 (1929).

[17/] In their Opposition to the Petition for Writ of Certiorari ("Opposition"), Respondents-Intervenors suggested that administrative convenience justifies the Missouri additional use tax scheme. Respondents-Intervenors' Opposition at 19-23. However, judicial economy should also be taken into account in considering administrative convenience. The increased confusion and room for controversy that will be caused by upholding the additional use tax in this case does not warrant the conclusion that the concern for administrative convenience supports the additional use tax.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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